In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1068

CARL N. SVEJCAR, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-1069

BERNARD GRIZAFFI AND LEONARD FALCONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pets. Apps.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1972. Petitions for rehearing were denied on January 2, 1973 (Svejcar Pet. App. B). The

500-621—73

petitions for writs of certiorari were filed on February 1, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly refused a "missing witness" instruction.
2. Whether testimony of an accountant was properly excluded.
3. Whether the court of appeals' review of the sufficiency of the evidence properly included evidence produced by both the defense and prosecution.
4. Whether the jury was correctly instructed on the knowledge necessary for conviction.
5. Whether petitioner Svejcar's theory of defense was adequately presented to the jury.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of a scheme to falsify the records of a federally-insured savings and loan association and with mail fraud in connection with that scheme, in violation of 18 U.S.C. 371, 1008, and 1341. Petitioner Svejcar was sentenced to four years' imprisonment. Petitioners Grizaffi and Falcone were each sentenced to two years' imprisonment. The court of appeals affirmed (Pets. Apps.).

The facts of the case are not in dispute. Petitioners Grizaffi and Falcone were building contractors and land developers who entered into an agreement with Apollo Savings and Loan Association to construct a development on land owned by Apollo. Petitioner

Svejcar, who was vice president of Apollo, entered into the arrangements on its behalf. The indictment charged that in the course of these arrangements, the records and books of Apollo were falsified in such a manner as to show inaccurate and inflated income flowing to Apollo. Additionally, it was charged that petitioners used the mails in furtherance of their scheme.

ARGUMENT

1. An unindicted co-conspirator, Edward Kelly, served as Apollo's chief operating officer during the transactions in question. Kelly was subpoenaed by the government but never called to testify. He was also "tendered" to the defense who likewise declined to call him because he refused, on the advice of his counsel, to discuss the case prior to testifying (II. App. 467–468, 480, 489).[1] Petitioners contend that because of Kelly's refusal to confer with them prior to testifying, "as a practical matter, Kelly was not available to the defense" (Grizaffi Pet., p. 10). Accordingly, since Kelly is alleged to have been peculiarly within the control of the government, petitioners claim that the jury should have been instructed that they could draw the inference that Kelly would have testified in a manner unfavorable to the government. This claim was properly rejected by the court of appeals.

The facts indicate that Kelly was equally available to both defense and prosecution. The record shows that prior to trial, the prosecution informed counsel

[1] "App." refers to the Appendix filed in the court of appeals, contained in three volumes. Copies have been lodged with this Court.

for the defense that Kelly was available and provided his address. Kelly was also offered to the defense for their use at the close of the government's case (II App. 467–488). As the court of appeals stated (Svejcar Pet. App., p. 6):

> It cannot fairly be said that Kelly was peculiarly within the control of the government; there is also no reason to believe the defendants had any right to be any more apprehensive about his testimony than the government. Although Kelly, on advice of his attorney, refused to discuss the case with the defendants, it simply does not logically follow that his testimony somehow would have been unfavorable to the government.

2. At trial, petitioners offered the expert testimony of an accountant in an effort to prove that the arrangements entered into by them could have conceivably resulted in a profit to Apollo (III App. 917–934). The district court properly sustained an objection to this evidence. As the court of appeals held, it was evident that the accountant would do no more than make simple "arithmetic computations," thus performing a function within the province of the jury (Grizaffi Pet. App., p. 5). The record supports these rulings. The information sought from the witness, as defense counsel conceded, was a matter of "simple multiplication and division" from "data * * * taken out of the record" (III App. 926). It was, therefore, within the discretion of the trial judge to refuse this testimony. See *e.g.*, *United States* v. *Alker*, 260 F. 2d 135, 155 (C.A. 3), certiorari denied, 359 U.S. 906; *United States* v. *Gallagher*, 437 F. 2d 1191 (C.A. 7), cer-

tiorari denied, 402 U.S. 1009. Nor can petitioner Svejcar successfully contend (Pet., pp. 16–21) that this evidentiary ruling precluded the admission of evidence pertaining to the possibility of profit resulting from the Appollo transactions. The facts upon which the accountant was to base his "opinion" were admitted into evidence (III App. 571–572, 920), and petitioners had no difficulty in arguing to the jury that Appollo could have realized "a profit of $1,275,646" from their activities (III App. 999–1000).[2] Moreover, as the district court held, the evidence was of limited relevance to a defense to a charge of falsifying records (III App. 934).[3]

3. Petitioners Grizaffi and Falcone contend (Grizaffi Pet., pp. 4–8) that the determination by the court of appeals that the evidence was sufficient was erroneously based upon evidence presented by the defense as well as the prosecution. This was the proper procedure. This Court, and all but one of the courts of appeals, have now held that "a defendant whose mo-

[2] Petitioners' reliance upon *United States* v. *Johnson*, 319 U.S. 503, is misplaced. Although *Johnson* is authority for the admission of expert accounting testimony under its facts, the thrust of that ruling is that "some discretion [should be allowed] to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules." 319 U.S. at 519–520.

[3] Petitioner Svejcar's complaint that other evidence was admitted "leaving the impression" that Apollo suffered losses (Pet., p. 17), ignores the fact the evidence which he cites (Pet., pp. 17–18), was admitted without objection. Assuming, what the record does not clearly reveal, that such an improper "impression" was created, the alleged prejudice could have been avoided by a timely objection or cured by a request for a corrective instruction.

tion for acquittal at the close of the Government's case is denied must decide whether to stand on his motion or put on a defense, with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty." *McGautha* v. *California,* 402 U.S. 183, 215–216; *United States* v. *Calderon,* 348 U.S. 160, 164; *United States* v. *Haskell,* 327 F. 2d 281, 282, n. 2 (C.A. 2), certiorari denied, 377 U.S. 945; *United States* v. *Feldman,* 425 F. 2d 688, 692 (C.A. 3); *United States* v. *Cashio,* 420 F. 2d 1132 (C.A. 5), certiorari denied, 397 U.S. 1007; *United States* v. *Carabbia,* 381 F. 2d 133, 137–138 (C.A. 6), certiorari denied, 389 U.S. 1007; *United States* v. *Tubbs,* 461 F. 2d 43, 45 (C.A. 7); *Cline* v. *United States,* 395 F. 2d 138 (C.A. 8); *Viramontes-Medina* v. *United States,* 411 F. 2d 981 (C.A. 9); *United States* v. *Greene,* 442 F. 2d 1285, 1286-1287, n. 3 (C.A. 10). *Contra, Cephus* v. *United States,* 324 F. 2d 893 (C.A.D.C.).[4]

4. Petitioner Svejcar urges (Pet., pp. 9–12) that the district court's instruction on the requisite knowledge for conviction was improper because it allowed the jury to find guilt based upon mere negligence. This claim is contradicted by the language of the charge when read in context. The court charged (III App. 1053–1054):

> An act is done willfully if it is done voluntarily and intentionally and with the specific

[4] While the Court of Appeals for the District of Columbia Circuit has held to the contrary in a number of cases decided prior to *McGautha* v. *California, supra* (Grizzafi Pet., pp. 5–6), the issue is not of sufficient importance to warrant review. See *Maffei* v. *United States,* 450 F. 2d 928 (C.A. 6), certiorari denied, 406 U.S. 938.

> intent to do something which the law forbids; *that is to say, with a bad purpose to either disobey or disregard the law, and not by mistake, accident or in good faith.*
>
> Now, the word "knowingly" as used in the crime charged means that *the act was done voluntarily and purposely and not, again, by accident or mistake.*
>
> Knowledge may be proved by a defendant's conduct and by all of the facts and circumstances surrounding the case. No person can *intentionally avoid knowledge* by closing his eyes to facts which prompt him to investigate. [Emphasis added.]

As the court below observed, this instruction was premised on LaBuy, *Manual on Jury Instructions in Federal Crimes Cases,* 33 F.R.D. 523, 553 (1963). The court below properly held that the instruction did not allow negligence as a basis for guilt. Contrary to petitioner's claim, the government was held to proof of an intentional act with actual knowledge of falsity as prescribed by the statute.[5]

5. Finally, petitioner Svejcar argues (Pet., pp. 13–15) that an instruction on his "good faith" defense was improperly refused by the trial judge. The record shows that the refused charge (Pet., p. 13; II App. 36–37) is substantially similar to the instructions actually given. The court instructed (II App. 1056):

> Now, in order to find the defendant Svejcar guilty of the crimes charged in Counts II and

[5] The cases cited by petitioner (Svejcar Pet., p. 10), do not hold that in these circumstances the jury *must* be instructed in so many words "that a person cannot be guilty due to negligence" (Pet., p. 11).

> III of the indictment that I have just reviewed for you, you must find from all of the evidence and beyond a reasonable doubt that the particular statements contained in the respective letters to Ceplecha were, in fact, false and that such defendant knew of the falsity at the time that the statement was made, and that such defendant contributed to and participated in the making of such statement, with the knowledge that it was false.
>
> You must find in order to justify such a verdict of guilty that such defendant took such action for the purpose of influencing some action of the Federal Savings and Loan Corporation. If the evidence should fail to convince you as to such defendant in any one of the respects which I have outlined, then you should find such defendant not guilty as to Counts II and III of the indictment.

This instruction was given in addition to the general instruction set forth earlier (*supra*, p. 7), defining "willfully and intentionally" as meaning "a bad purpose to either disobey or disregard the law, and not by mistake, accident or in good faith."

Under these instructions—albeit in different language—petitioner's theory of good faith was adequately presented to the jury. Unlike the cases cited by him, the instructions here did not fail to give his theory of defense the proper emphasis. The instructions were, moreover, given in direct reference to offenses charged against petitioner in specific counts (see III App. 1056), and cannot be said to have been mere general instructions that would have left petitioner's defense to the "inference and speculation" of the jury.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
FRED M. ACUFF, JR.
Attorneys.

APRIL 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973